

MICHIGAN SUPREME COURT

PUBLIC HEARING

MAY 26, 2005

JUSTICE TAYLOR: Good morning. I'd like to welcome you to the Court's public hearing and we have a few rules here on these public hearings and that is the speakers get 3 minutes. Of course if you're witty, amusing or most importantly flattering we are willing to extend your time. With that having been said, John Gear is here to speak about Item No. 4. Please come forward sir.

ITEM 4: 2004-46 AMENDMENT OF MCR 7.211

MR. GEAR: Good morning. Thank you Mr. Chief Justice, Justices of the Supreme Court. May it please the Court. I'm here to first thank you for the opportunity to comment on the proposed rule change and then to just share some concerns regarding the change. My witty, flattering and amusing remarks will commence with the comment that there are three concerns dealing with sealing records of the courts. They fall into the areas of principle, politics and practical. Under principle, courts should be open. In a democracy openness is essential, particularly in a court system and as this Court said in Rausch v News & Enquirer of Battle Creek, the press doesn't simply just publish information about trials but guards against the miscarriage of justice by subjecting judicial processes to extensive public scrutiny and criticism. That is essential. If people want private dispute resolution there are a number of avenues that are growing all the time that allow people to pursue private justice. In the public justice system, the taxpayer supported justice system, the people have a right to expect that all the records produced will be public without the ability to check the record, to check the conclusion, to see what the court saw. The court's pronouncements and opinions become a little more inscrutable and that tends to lead to a diminution of the confidence that we can all look at the same cards and reach the same result. Politically I think this proposal is unwise because the exemption of the courts from FOIA I think was predicated on the presumption that while everything the courts do outside their deliberations, outside chambers, is open already. When you start talking about sealing records at the appellate court level you are changing the presumption that led the Legislature to exempt the courts from FOIA. Further there is, and there has been criticism in other states including reported in the American Bar Journal about sealing records and criticism leveled at judges who seal records and in one case it was reported that this was a case of good old American know-who, that parties were able to get cases sealed and there were charged of favoritism. The problem is with sealed records you invite questions about what was sealed, why it was sealed and for whom can they be sealed. Practically the good cause standard is an interesting standard because it is so flexible. And I'm concerned about the effects of litigation not only on the parties before the court who are seeking a record sealing, but future parties. There are a

number of times when parties A and B, their case is over, but parties C and D or E and F or G and H have conflicts that relate to the first, and if they are unable to get those records they are harmed by the sealing of records. So for those reasons I would urge the Court to tread very carefully, to consider the proposed rule change very carefully, and to ensure that if there is a provision to allow the court to seal records, that it is done with the greatest restraint and the greatest degree of openness. Thank you.

JUSTICE TAYLOR: Thank you sir. Mark Cooney.

MR. COONEY: Good morning. May it please the Court, Mark Cooney speaking today on behalf of the Appellate Practice Section of the State Bar. We considered this proposal not once but twice at council meetings. The first time we thought that it was a good idea and we thought that the language was carefully tailored enough that we didn't have anything to comment on. Later individual council members scrutinized it more closely and then we took it up again just this past Friday and our belief is still that this is a good idea. It's laying out procedures for situations where somebody wants to request that the file be sealed. Our comment is really what I hope the Court will take as a friendly amendment. The concern that our council ultimately had was that there could be potential confusion with the court rule's language in the description of the trial court file versus the Court of Appeals file so we submitted to the Court some proposed language and really all we're suggesting is a definition of what the trial court file is and what the Court of Appeals file is and then creating some additional headings and subheadings. So again our first look at this revealed that we thought it was perfectly okay but in giving it a second look we think there could be just additional clarity.

JUSTICE TAYLOR: With regard that to point the peril which we're concerned about is, as I understand it, that a litigant wouldn't know which court to petition?

MR. COONEY: That was one concern that was brought up.

JUSTICE TAYLOR: Do you really think that's the case when the case has been sealed already in the circuit court, it's now on appeal to the Court of Appeals. Who would be confused as to which court you had to now petition to seal it in the Court of Appeals. How could you realistically have a problem with that?

MR. COONEY: I think that proposed Rule 9A goes a long way towards clarifying that, Your Honor. Absolutely, I acknowledge that's true. Again some of the council members were thinking of it from the point of view of somebody who is not as familiar with how the trial court file is dealt with within the Court of Appeals. In other words, that there might be a point in time where that trial court file would get to the Court of Appeals and perhaps be physically joined with the Court of Appeals and that it then would become part of the "Court of Appeals file".

JUSTICE YOUNG: If that were someone's fantasy what is the harm. Why would we change the rule to anticipate the uninformed fantasy of a litigant?

MR. COONEY: Well I think the rule appears to be designed to prevent unnecessary requests concerning the trial court file in the Court of Appeals and I suppose if we were trying to prevent that and make it as Rule 9A says, make it very clear that somebody who wants to unseal something in the trial court file should go to the trial court, then clarifying it additionally would make it perhaps just crystallize that more. Again I think 9A goes a long way towards it but just additional clarity so that people would know you need to go to the trial court if you have some beef about the trial court sealing some aspect or the entire trial court file. That shouldn't be something that is burdening the Court of Appeals. 9A again seems to be trying to avoid extra motion practice in the Court of Appeals concerning the trial court.

JUSTICE CORRIGAN: Let me just make this clear the appellate practice section understands in this rule requirement that it wants that it's going to slow down the progress of appeals and that the trial court is going to have to get the record back from the Court of Appeals. There is going to be all that transition and delay and still the appellate practice section wants that to occur?

MR. COONEY: Well that's certainly not our desired result. We were hoping that any changes that we suggest would just make it clear that perhaps the request for relief would go to the trial court. I don't know that we anticipated that the trial court would then have to reorder the record and--

JUSTICE CORRIGAN: Sure it would have, wouldn't it? How can it just take an action in the blue without the record?

JUSTICE WEAVER: Have you submitted your ideas in writing?

MR. COONEY: Yes. Very late in the game. Yesterday, in fact. This was originally proposed in November and we did take it up in our December meeting and as I said it passed muster at that time and then a number of council members raised concerns later in the game and ultimately there was a request to revisit it very recently and we took it up again last Friday.

JUSTICE KELLY: Yeah, it's helpful to have the written proposal for us.

MR. COONEY: And if we're going to comment it's our philosophy or at least we're trying to be diligent about offering some alternative rather than just--

JUSTICE WEAVER: Yeah, I'm not criticizing, I was just asking.

MR. COONEY: Appreciate the opportunity to speak, Your Honor.

ITEM 5: 2004-47 AMENDMENT OF MCR 7.302

JUSTICE TAYLOR: Stay where you are, Mr. Cooney. I think you have a second comment, do you not, on Item No. 5?

MR. COONEY: I do, and that's just to say since I was here for Item #4, just to reaffirm the fact that the Section supports this proposed amendment because it adds clarity and the Section was delighted to see that the State Bar decided to adopt our two-sentence comment in wholesale fashion in its letter to the Court. We think that's an excellent idea and a very well-crafted rule.

JUSTICE TAYLOR: Thank you very much. That completes the public hearing. We stand adjourned.